Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT GUS "BOBBY" DESSELLE, ALSO KNOWN AS UNCLE, ALSO KNOWN AS TIO, ALSO KNOWN AS POPS,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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SEPTEMBER 22, 2006

QUESTION PRESENTED

Whether the Fifth Circuit's reversal of a downward departure imposed pursuant to Section 5K1.1 of the Federal Sentencing Guidelines and 18 U.S.C. Section 3553(e) based upon the district court's consideration of factors outlined in *both* Section 5K1.1 and Section 3553(a) violates *U.S. v. Booker*, 543 U.S. 220 (2005), the plain language of Section 3553(a), and well-established precedent vesting district courts with the discretionary authority to determine the extent of downward departures?

PARTIES TO THE PROCEEDING BELOW

The parties named in the case caption comprise the list of all parties to the proceeding in the court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTNED.....	i
PARTIES TO THE PROCEEDING BELOW.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
RELEVANT STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE WRIT.....	7
CONCLUSION.....	11

APPENDIX

A. Opinion of Fifth Circuit Court of Appeals	1a
B. Judgment in a Criminal Case.....	8a
C. Partial Transcript of Sentencing Hearing in District Court and Reasons for Judgment	22a
D. Fifth Circuit Court of Appeals Denial of Petition for Rehearing En Banc.....	25a
E. Relevant Statutory Provisions.....	27a

TABLE OF AUTHORITIES

Page(s)

CASES

United States Supreme Court Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000).... 7

Blakely v. Washington, 542 U.S. 296 (2004)..... 7

U.S. v. Booker, 543 U.S. 220 (2005) 7

Federal Circuit Court Cases

U.S. v. Auld, 321 F.3d 861 (9th Cir. 2003)..... 7

U.S. v. Bullard, 390 F.3d 416 (6th Cir. 2004)..... 7

U.S. v. Campbell, 995 F.2d 175 (10th Cir. 1993)... 7

U.S. v. Carey, 382 F.3d 387 (3rd Cir. 2004)..... 7

U.S. v. Cooper, 274 F.3d 230 (5th Cir. 2001)..... 6,10

U.S. v. Davis, 407 F.3d 1269 (11th Cir. 2005)..... 7

U.S. v. Hashimoto, 193 F.3d 840 (5th Cir. 1999).... 10

U.S. v. Johnson, 33 F.3d 8 (5th Cir. 1994)..... 10

U.S. v. Mariano, 983 F.3d 1150 (1st Cir. 1993)..... 7

U.S. v. Pepper, 412 F.3d 995 (8th Cir. 2005)..... 7

LAWS

18 U.S.C. § 1957..... 2

18 U.S.C. § 3231..... 1

18 U.S.C. § 3553(a)..... *passim*

18 U.S.C. § 3553(e)..... *passim*

21 U.S.C. § 846..... 2

28 U.S.C. § 1254 (1)..... 1

U.S.S.G. § 5K1.1..... *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 450 F.3d 179 (5th Cir. 2006); *see also* Petitioner's Appendix ("App.") page ("p.")1a. The opinion of the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing En Banc is not designated for publication. App. p. 25a. The sentencing proceedings in this case are unpublished. App. p. 23a.

JURISDICTION

The original opinion sought to be reviewed was entered by the court of appeals on May 22, 2006. Petitioner's timely filed Petition for Rehearing En Banc was denied by the court of appeals on June 28, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix. *See* App. pp. 27a-34a.

STATEMENT OF THE CASE[1]

On September 8, 2003, Petitioner entered into a plea agreement with the government. Pursuant to the plea agreement, Petitioner pled guilty to conspiracy to distribute

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[1] 18 U.S.C. § 3231 is the basis for the federal jurisdiction exercised by the district court in this case.

more than five kilograms of cocaine in violation of 21 U.S.C. § 846 and to money laundering in violation of 18 U.S.C. § 1957. In addition, Petitioner agreed to surrender nearly one million dollars in assets to the government. Record on Appeal ("ROA") Docket No. 460. These assets included legitimate assets that Petitioner inherited from the sale of his deceased parents' home and business. This asset forfeiture was agreed to by Petitioner even though there was no viable legal theory supporting the forfeiture.

The plea agreement also contained a "cooperation provision" wherein Petitioner agreed to provide complete and truthful information to the government. ROA, Docket No. 460. As a condition of this plea agreement, the government retained the discretion to move for a downward departure based upon the quality of Petitioner's cooperation. ROA, Docket No. 460. After entering his guilty plea, Petitioner was thoroughly debriefed on numerous occasions by agents of the DEA, FBI, and IRS. See United States' Memorandum in Support of 5K1.1 Motion, ROA, Docket No. 419, Defendant's Exhibit 13. According to the Government's Memorandum in Support of the 5K1.1 Motion, Petitioner provided historical information regarding individuals already being prosecuted by the government, and provided current intelligence regarding drug traffickers currently under investigation. ROA, Docket No. 419. The government also conceded that all of the information provided by Petitioner was corroborated by other information received by law enforcement authorities. ROA, Docket No. 419.

At the request of federal law enforcement officials, Petitioner met with known drug traffickers in an effort to obtain information for the government. ROA, Docket No. 419, Defendant's Exhibits 11, 15, and 16. Some of these drug dealers made inculpatory comments to Petitioner and indicated they would be willing to buy drugs from Petitioner. ROA, Docket No. 419, Defendant's Exhibits 11, 15, and 16.

At least one of these individuals threatened to kill anyone that cooperated against him. ROA, Docket No. 419, Defendant's Exhibits 11, 15, and 16.

Petitioner went way beyond his duty to cooperate when he agreed to assist in the State of Louisiana's prosecution of two individuals who were accused of murdering a young woman and two young children. The Assistant District Attorney for the State of Louisiana, Robin O'Bannon, met with Petitioner on two occasions and determined that he "would be absolutely instrumental" to the prosecution of the state murder case. See Letter from ADA Robin O'Bannon, 1st Supp. ROA, pp. 33-34. For reasons which have never been explained by the government, the United States Attorney threatened to revoke Petitioner's plea agreement if he cooperated in the State of Louisiana's murder investigation. See Letter from ADA Robin O'Bannon, 1st Supp. ROA, pp. 33-34. Assistant District Attorney O'Bannon "was stunned and appalled" by the government's refusal to allow Petitioner to assist in her investigation. 1st Supp. ROA, pp. 33-34. In Assistant District Attorney O'Bannon's opinion, the government's refusal to allow Petitioner to cooperate with State authorities resulted in one of the accused murderers being released from prison. 1st Supp. ROA, pp. 33-34.

On November 4, 2004, the government elected to file its discretionary Motion for Departure under Section 5K1.1 and 18 U.S.C. Section 3553(e). In adhering to their office policy regarding departure recommendations, the government's Motion recommended a two level reduction in Petitioner's Guideline offense level. See ¶ 5, p. 2, ROA, Docket No. 419, Defendant's Exhibit 13. The government's Motion also requested that the Motion be kept under seal because Petitioner's cooperation involved sensitive investigations of dangerous narcotics traffickers. ROA, Docket No. 419. In this Motion, the government outlined Petitioner's cooperation and affirmed that Petitioner had provided substantial

assistance in the investigation of other persons who had committed offenses. See ¶ 5, p.2, ROA, Docket No. 419.

After the district court reviewed the Government's Departure Motion, the PSR, and Sentencing Memoranda, a sentencing hearing was held on February 3, 2005. Because Petitioner's cooperation had put himself and his family in grave danger, the district court conducted two sentencing hearings – a sealed hearing wherein the cooperation agreement was discussed and an open hearing wherein the sentence was pronounced without any reference to Petitioner's cooperation. Supp. ROA, Docket No. 443.

The district court calculated Petitioner's total offense level at 39 (which had a guideline range of 262-327 months), granted a ten level reduction based upon the government's Section 5K1.1 Motion, and sentenced Petitioner to eighty-seven months. The district court's 5K departure was "based on the government's 5K1.1 Motion." Supp. ROA, Docket No. 443, p. 35, App. p. 22a.

After making this finding regarding the 5K1 Motion, the district court stated that the sentence was based upon consideration of the "United States Sentencing Guidelines and the sentencing factors enumerated in 18 U.S.C. § 3553(a)." Supp. ROA, Docket No. 443, p. 49, App. p. 23a. The district court also made the following observations:

> You certainly, I think were in it to make money, and you made a lot of money. And your money has been forfeited and your assets have been forfeited. And I considered that aspect as well. You have lost, in that sense, a lot of money, you know by the forfeiture of all of the property and assets that you have – or most of your assets.

You, on the other hand, have serious medical problems. You are now 57 years old. You know, 87 months from now, I do not think you are going to be wanting to go into the drug business. I think by that time you will be of sufficient age to just, you know, live out your life in a manner that does not involve dealing with drugs and breaking the law.

I think that the sentence that I have imposed, based on the circumstances of the offense, the history and characteristics of the defendant, meet the needs of society; and it does reflect the seriousness of the offense; and it will show people that you are eventually going to get caught; and that you are eventually going to go, you know, to prison; and that this is a just punishment, along with the forfeitures that you have made and the fine that will be paid, for the offense.

And I think that the sentence that I render will also afford adequate deterrence to further criminal conduct as much as those things have a tendency to do. I do not think that any further or longer sentence would protect the public from any crimes that you may commit in the future. If that does not get the message to you, then I do not think a longer sentence would. And it will also, hopefully, provide you with needed medical care and help you with the drug problem that you have.

> Now, as I have said, this is within the range that is applicable under the finding by the court. It is not the lowest sentence that you could get; it is not the highest sentence that you would get, but I think it is adequate for the needs here. I, you know, cannot overlook the things that you have done, you know, on the good side as well. But you are going to have to pay for what you have done. Supp. ROA, Docket No. 443, p. 51, App. pp. 23a-24a.

This sentence was the subject of an appeal filed by the government. The Fifth Circuit Court of Appeals remanded the case for resentencing based upon its determination that the district court abused its discretion by considering non-assistance related factors, such as the factors listed in 18 U.S.C. § 3553(a), in determining the 5K1.1 departure. Specifically, the appellate court announced a new rule of law that would now be followed in the Fifth Circuit – "the extent of a § 5K1.1 or § 3553(e) departure must be based solely on assistance-related concerns." App. p. 5a. In addition, the appellate court determined that the district court's "extraordinary" departure was not supported by the nature of Petitioner's assistance App. p. 7a. This pronouncement also represented a change in the law as district courts within the Fifth Circuit had, prior to this opinion, been vested with almost complete discretion in determining the extent of § 5K1.1 departures. *U.S. v. Cooper*, 274 F.3d 230, 248 (5th Cir. 2001). Petitioner's timely filed Petition for Rehearing En Banc was denied by the Fifth Circuit. App. p. 25a.

Petitioner now seeks certiorari review of the decision of the Fifth Circuit remanding Petitioner's case back to the district court for resentencing.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's opinion in this case forbids a sentencing court from considering any of the factors enumerated in 18 U.S.C. § 3553(a) when the court also decides to issue a departure under § 5K1.1 and § 3553(e). This opinion effectively renders § 3553(a) obsolete in cases where a § 5K1.1 departure is at issue. First and foremost, this opinion violates *Booker* and the plain language of 18 U.S.C. §3553(a). Second, this dramatic change in the law divests district courts of the almost complete discretion they have wielded for decades when deciding on the extent of § 5K1.1 departures. Since several other federal appellate courts[2] have also adopted this position, this Court should grant certiorari review to provide much needed guidance in how *Booker* and § 3553(a) apply to departures under § 5K1.1.

In *United States v. Booker*, 543 U.S. 220, 226-27, 245 (2005), relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), this Court concluded that the Federal Sentencing Guidelines violated the Sixth Amendment as a result of the imposition of enhanced sentences on the basis of the sentencing judge's determination of facts that were not found by the jury or admitted by the defendant. In order to remedy the Sixth Amendment violation, this Court severed and excised the provision of the federal sentencing statute making the

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[2] *See Post-Booker cases: U.S. v. Pepper*, 412 F.3d 995, 998 (8th Cir. 2005); *U.S. v. Davis*, 407 F.3d 1269, 1271 (11th Cir. 2005); *see also pre-Booker cases: U.S. v. Bullard*, 390 F.3d 413, 416 (6th Cir. 2004); *U.S. v. Auld*, 321 F.3d 861, 867 (9th Cir. 2003); *U.S. v. Pearce*, 191 F.3d 488, 492 (4th Cir. 1999); *U.S. v. Thomas*, 11 F.3d 732, 737 (7th Cir. 1994); *U.S. v. Campbell*, 995 F.2d 173, 175 (10th Cir. 1993); *U.S. v. Mariano*, 983 F.2d 1150, 1156 (1st Cir. 1993). *But cf. U.S. v. Carey*, 382 F.3d 387, 391 (3rd Cir. 2004)(stating that factors not listed in 5K1.1 can been considered in deciding the extent of a 5K1.1 departure.).

Guidelines mandatory and the review provision which depended on the Guidelines' mandatory nature. 543 U.S. at 245. As a result, the Guidelines became "effectively advisory." *Id.* at 245. As modified, the federal sentencing provisions require a sentencing court "to consider" the Guidelines ranges pursuant to 18 U.S.C. § 3553(a)(4), but also permit the court "to tailor the sentence in light of other statutory concerns as well," as set forth in § 3553(a). *Id.* at 245-46.

Section 5K1.1 of the Federal Sentencing Guidelines allows a district court to downwardly depart from the Guidelines upon motion of the government certifying that the defendant has provided substantial assistance. This Section provides a *non-exhaustive*[3] list of factors that the court can consider when deciding on the extent of the departure. 18 U.S.C. §3553(e)[4] vests the district court with even more sentencing latitude than § 5K1.1 in that it allows a district court to impose a sentence below the statutory minimum if the government files a motion under this provision.

In the Petitioner's case, the government filed a departure motion under both § 5K1.1 and § 3553(e). By filing under Section 3553(e), the government acquiesced to the possibility that the district court might choose to impose a sentence below the mandatory minimum.

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[3] § 5K1.1 (a) of the Federal Sentencing Guidelines provides in pertinent part that "the appropriate reduction shall be determined by the court for reasons stated that *may* include, *but are not limited to*, consideration of the following..."(emphasis added).

[4] 18 U.S.C. § 3553(e) provides in pertinent part that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance..."

After carefully considering the government's detailed written memorandum detailing Petitioner's cooperation, the PSR, and other memoranda detailing the nature of the offense and the history of the defendant, the district court granted the government's 5K1 Motion and departed from the Guidelines based upon the court's assessment of the § 5K1 factors and the factors enumerated in § 3553(a). In essence, the district court combined the § 5K1.1 factors and the § 3553(a) factors to arrive at what it concluded was a just sentence in this particular case.

Clearly, the district court was allowed to consider the Petitioner's cooperation as a factor for departure under § 5K1. However, contrary to the appellate court's decision in this case, the district court's discretionary sentencing authority did not end with the assessment of the factors specifically enumerated in Section 5K1.1. *Booker* explicitly holds that the Guidelines, which include §5K1.1, are now merely advisory tools and that a sentencing court has the discretionary power to render a non-Guideline sentence utilizing the factors enumerated in § 3553(a). *Id.* at 245-46.

In this case, the district court combined the § 5K1 factors with the § 3553(a) factors in accordance with *Booker*'s mandate that sentencing courts tailor a sentence based upon the application of the enumerated sentencing considerations outlined in 18 U.S.C. § 3553(a). *Id.* The appellate court's decision in this case held that the § 5K1 Motion stripped the district court of its discretionary power to consider any of the § 3553(a) factors or any factor not directly related to the Petitioner's cooperation. This holding is in direct contravention of *Booker* which explicitly grants the district court the discretionary authority to issue non-Guideline sentences irrespective of the filing of a § 5K1.1 Motion. The fact that a 5K1.1 Motion is filed does not render the § 3553(a) factors irrelevant to the sentencing decision. Rather, the filing of the 5K1.1 Motion gives the district court another set

of factors to consider along with the § 3553(a) factors in imposing a sentence in accordance with *Booker*.

The appellate court in this case effectively stripped the district court of its discretionary authority to evaluate a defendant's cooperation by making factual findings regarding the quality of Petitioner's cooperation and finding it to be of little value. Prior to the appellate ruling in this case, district courts in the Fifth Circuit had complete discretion in determining the extent of departures under § 5K1.1. *U.S. v. Cooper*, 274 F.3d 230, 248 (5th Cir. 2001); *U.S. v. Hashimoto*, 193 F.3d 840, 843 (5th Cir. 1999). In exercising this almost complete discretion, district courts were to free to grant departures greater or smaller than that recommended by the government. *U.S. v. Johnson*, 33 F.3d 8, 10 (5th Cir. 1994). Before the appellate decision rendered in this case, a district court's factual findings regarding the extent of cooperation was not overturned by the appellate court. *See Id.* at 9-10, n.10 (stating that sentencing judges and not the appellate court must decide the extent of a 5K1.1 departure).

There are sound policy reasons for entrusting district courts with almost complete discretion to determine the extent of downward departures under § 5K1.1. Allowing the district courts to evaluate the extent of a defendant's cooperation which is outlined in sealed documents and sealed proceedings keeps the details of the defendant's cooperation out of the public forum. If appellate courts now assume the perilous task of evaluating the quality of the cooperation, this once secret information will now be published in the public forum. The cooperator will be branded a snitch which will put the life of the cooperator and the lives of his family in great peril.

The rights and lives of those courageous defendants who choose to assist the government in investigating and apprehending other dangerous criminals must be protected. Entrusting district court's with the onerous task of evaluating

a defendant's cooperation in sealed proceedings is the only way to ensure that the cooperation efforts of these defendants are not exploited in an appellate court's published or even non-published opinion which is available for public review.

This Court should grant certiorari review to settle the question of whether *Booker* and § 3553(a) applies to departures under § 5K1.1. In addition, this Court should grant certiorari review to resolve the issue of whether the district court still retains the discretionary authority to evaluate the quality of a defendant's cooperation and the corresponding departure under § 5K1.1

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the judgment of the Fifth Circuit Court of Appeals reversed.

RESPECTFULLY SUBMITTED,

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APPENDIX

APPENDIX A

May 22, 2006, Filed

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,

versus

ROBERT GUS "BOBBY" DESSELLE, also known as Uncle, also known as Tio, also known as Pops, Defendant-Appellee

No. 05-30401

JUDGES: Before JONES, Chief Judge, and BARKSDALE and BENAVIDES, Circuit Judges.

OPINION: EDITH H. JONES, Chief Judge:

The United States appeals from the extent of the district court's departure for Desselle's assistance to law enforcement under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e). Because the district court reversibly erred in allowing improper factors to govern its decision, we VACATE and REMAND for resentencing.

BACKGROUND

Bobby Desselle worked as a funeral director at his family's funeral home in Baton Rouge. On the side, he sold large quantities of cocaine and marijuana, earning a substantial profit which he laundered through extravagant purchases and business ventures. In 2004, Bobby Desselle pleaded guilty to money laundering and conspiracy to distribute more than five kilos of cocaine. As part of the plea agreement, Desselle cooperated with officials, and the United States made a motion to reduce Desselle's sentence for his substantial assistance under both U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e). Based on Desselle's "minimal" substantial assistance, however, the United States recommended only a two-level reduction in his base offense level, which would have resulted in a guideline range of 210-262 months. The district court calculated Desselle's total offense level at 39 (which had a guideline range of 262-327 months), granted a ten-level reduction for Desselle's substantial assistance, and sentenced him to eighty-seven months, the minimum within the guideline range after the ten-level reduction was made. The departure reduced Desselle's sentence by sixty-seven percent from the minimum sentence for his calculated offense level and nearly twenty-eight percent from the statutory minimum of ten years.

In so departing and sentencing Desselle, the district court explained that it considered the Guidelines, documents presented to it, and "the medical status of the defendant":

And I do not at all take what you did, Mr. Desselle lightly in any factor. You were a major drug dealer in this area. You know, got alot of folks, you know, wrapped up in a lot of things and -- you know, and all of you are now having to serve prison sentences.

You certainly, I think, were in it to make money, and you made a lot of money. And your money has been forfeited and your assets have been forfeited. And I considered that aspect as well. You have lost, in that sense, a lot of money, you know, by the forfeiture of all of the property and assets that you have -- or most of your assets.

You, on the other hand, have serious medical problems. You are now 57 years old. You know, 87 months from now, I do not think you are going to be wanting to go into the drug business. I think by that time you will be of sufficient age to just, you know, live out your life in a manner that does not involve dealing with drugs and breaking the law.

I think that the sentence that I have imposed, based on the circumstances of the offense, the history and the characteristics of the defendant, meet the needs of society; and it does reflect the seriousness of the offense; and it will show people that you are eventually going to get caught; and that you are eventually going to go, you know, to prison; and that this is a just punishment, along with the forfeitures that you have made and the fine that will be paid, for the offense.

And I think that the sentence that I render will also afford adequate deterrence to further criminal conduct as much as those things have a tendency to do. I do not think that any further or longer sentence would protect the public from any crimes that you may commit in the future. If that does not get the message to you, then I do not think a longer sentence would. And it will also, hopefully, provide you with needed medical care and help you with the drug problem that you have.

Now, as I have said, this is within the range that is applicable under the finding by the court. It is not the lowest sentence that you could get; it is not the highest sentence you would get, but I think it is adequate for the needs here. I, you know,

cannot overlook the things that you have done, you know, on the good side as well. But you are now going to have to pay for what you have done.

This statement was made in open court. In a sealed proceeding, the Government objected to the § 5K1.1 departure, but the district court did not make any comments about why the extent of the departure was reasonable or discuss the § 5K1.1 factors.

DISCUSSION

In sentencing defendants after Booker, district courts must first calculate the guideline range, a calculation which is reviewed de novo. United States v. Smith, 440 F.3d 704, 706 (5th Cir. 2006). If a sentencing court imposes a sentence that includes an upward or downward departure as allowed by the Guidelines, this court reviews both the decision to depart and the extent of that departure for abuse of discretion. Id. at 707; see also United States v. Simkanin, 420 F.3d 397, 415-16 (5th Cir. 2005) (using that standard in reviewing an upward departure). "In assessing the extent of a departure, we continue to look to our pre-Booker case law for guidance." Smith, 440 F.3d at 707. "A district court abuses its discretion if it departs on the basis of legally unacceptable reasons or if the degree of the departure is unreasonable." United States v. Harris, 293 F.3d 863, 871 (5th Cir. 2002) (cited favorably in Simkanin, 420 F.3d at 416 & n.21). Appellate courts must ultimately "determine whether the sentence 'is unreasonable' with regard to" the factors outlined in 18 U.S.C. § 3553(a). United States v. Booker, 543 U.S. 220, 261, 125 S. Ct. 738, 765, 160 L. Ed. 2d 621 (2005).

Although judges have latitude under § 5K1.1, they must "conduct a judicial inquiry into each individual case before independently determining the propriety and extent of any departure in the imposition of sentence." United States v.

Johnson, 33 F.3d 8, 9 (5th Cir. 1994). Section 5K1.1 requires the court to state its reasons for imposing the departure, reasons "that may include, but are not limited to, consideration of the following:"

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

U.S.S.G. § 5K1.1.

Although the enumerated reasons are not the only factors a court may consider in determining the extent of the § 5K1.1 departure, a court must begin to assess a § 5K1.1 departure using the criteria listed by the Guidelines. Further, the additional factors a court may consider must be related to determining the "nature, extent, and significance of assistance." See U.S.S.G. § 5K1.1 Application Note Background. We thus join the majority of circuits in holding that the extent of a § 5K1.1 or § 3553(e) departure must be based solely on assistance-related concerns.[1]

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[1] See, e.g., United States v. Pepper, 412 F.3d 995, 998 (8th Cir. 2005) (even though § 5K1.1 provides a non-exhaustive list of factors to consider, the maxim that words are known by their companions requires that any additional factors a district court uses must be related to the defendant's assistance); United States v.

The district court here abused its discretion by considering non-assistance-related factors in determining the extent of the § 5K1.1 departure. See Harris, 293 F.3d at 871 (abuse of discretion if district court departs for an impermissible reason); see also United States v. McVay, 447 F.3d 1348, 2006 U.S. App. LEXIS 11335, No. 04-13455, slip. op. at 16 (11th Cir. May 5, 2006) (consideration of improper factors in the context of a § 5K1.1 departure "was error as a matter of law and must be reversed"). Although the district court had discretion to decide "(1) whether to depart from the guidelines based on substantial assistance, and (2) if so, the reasonable extent of that departure, plainly it did not have discretion to consider factors altogether unrelated to the nature and extent

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Davis, 407 F.3d 1269, 1271 (11th Cir. 2005) ("While the sentencing court had discretion under § 5K1.1 in deciding whether to depart from the guidelines and the extent of that departure, it did not have the discretion to consider factors unrelated to the nature and type of [the defendant's] assistance."); United States v. Bullard, 390 F.3d 413, 416 (6th Cir. 2004) (so holding); United States v. Auld, 321 F.3d 861, 867 (9th Cir. 2003) (same); United States v. Pearce, 191 F.3d 488, 492 (4th Cir. 1999) (same); United States v. Thomas, 11 F.3d 732, 737 (7th Cir. 1994) ("[A] downward departure from the statutory minimum sentence for any purpose other than that provided in U.S.S.G. § 5K1.1 would conflict with and therefore violate the statute [§ 3553(e)]."); United States v. Campbell, 995 F.2d 173, 175 (10th Cir. 1993) (so holding); United States v. Mariano, 983 F.2d 1150, 1156 (1st Cir. 1993) ("While the Commission's list is representative rather than exclusive, the five enumerated factors should be considered the mother lode of substantial assistance inquiries. . . . As a basis for departing, a court may consider mitigating factors only to the extent that they can fairly be said to touch upon the degree, efficacy, timeliness, and circumstances of a defendant's cooperation."). But see United States v. Carey, 382 F.3d 387, 391 (3d Cir. 2004) ("On occasion, and despite the terms of a government recommendation, factors other than those listed in 5K1.1 have been considered in deciding the extent of a departure.").

of [the defendant's] assistance." 2006 U.S. App. LEXIS 11335 [slip. op.] at 17.

Moreover, on the record, the extraordinary departure is not supported by the nature of Desselle's assistance. "An extraordinary reduction must be supported by extraordinary circumstances." United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005). Without such a rule, there would be "little room for greater departures for defendants who actually participate in controlled buys, wear wires, give grand jury and trial testimony, or are subjected to significant risk of injury or death to themselves or their family." United States v. Haack, 403 F.3d 997, 1005-06 (8th Cir. 2005). Desselle did not follow instructions from the FBI agents with whom he dealt and provided little helpful information. These are clearly not the "extraordinary circumstances" required to support a departure of sixty-seven percent.

CONCLUSION

We VACATE and REMAND Desselle's sentence for resentencing in a manner consistent with § 5K1.1, this opinion, and the Supreme Court's decision in Booker.

VACATED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

v.
THE DEFENDANT:

Robert Gus "Bobby" Desselle AKA "POPS," "UNCLE" AND "TITO"

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)
Case Number: 3:01CR00172-002

James Michael Small and Timothy Meche Defendant's Attorney

x pleaded guilty to count(s) I, II of the Information.
_ pleaded nolo contendere to count(s) ___ which was accepted by the court.
_ was found guilty on count(s) (INDICTMENT) after a plea of not guilty.

Accordingly, the court had adjudicated that the defendant is guilty of the following offenses:

Title &Section	Nature of Offense	Date Offense Concluded	Count Number(s)

See next page.

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).

[] Count(s) ___ is/are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

February 3, 2005
Date of Imposition of Judgment

/s/ _____
Signature of Judicial Officer

JAMES J. BRADY, United States District Judge

Name & Title of Judicial Officer

3-1-05
Date

CASE NUMBER: 3:01CR00172-002

DEFENDANT: ROBERT GUS "BOBBY" DESSELLE
AKA "POPS," "UNCLE" AND "TIO"

Title & Section
21 U.S.C. 84 & 18 U.S.C.§ 2

Nature of Offense
Conspiracy to Distribute Cocaine

Date Offense Concluded
October 31, 2001

Count Number(s)
I

Title & Section
18 U.S.C. §§ 1957 & 2

Nature of Offense
Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

Date Offense Concluded
July 24, 2000

Count Number(s)
II

CASE NUMBER: 3:01CR00172-002

DEFENDANT: ROBERT GUS "BOBBY" DESSELLE AKA "POPS," "UNCLE" AND "TIO"

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 87 months on counts I and II to run concurrent. **This judgment is not to be executed until the defendant surrenders to the designated institution.**

[x] The court makes the following recommendations to the Bureau of Prisons:

that he receive medical treatment and substance abuse treatment while incarcerated.

[] The defendant is remanded to the custody of the United States Marshal.

[] The defendant shall surrender to the United States Marshal for this district,
at _____ on _____.
[]as notified by the United States Marshal.

[x] The defendant shall surrender for service of sentence at the institution designed by the Bureau of Prisons.
[x]before 2 p.m. on April 4, 2005. All previous orders regarding voluntary surrender are rescinded.
[]as notified by the United States Marshal.
[]as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to

_____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY U.S. MARSHAL

CASE NUMBER: 3:01CR00172-002

DEFENDANT: ROBERT GUS "BOBBY" DESSELLE AKA "POPS," "UNCLE" AND "TIO"

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five years.

on Count I and terms of three years on Count II, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

[] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[x] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions attached to this page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or

personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CASE NUMBER: 3:01CR00172-002

DEFENDANT: ROBERT GUS "BOBBY" DESSELLE
AKA "POPS," "UNCLE" AND "TIO"

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a substance abuse assessment and/or treatment program which may include urine testing and residential treatment, and shall assist in the cost of said treatment, as approved by the probation office.

2. The defendant shall provide the probation officer with access to any requested financial information

3. The defendant shall not incur new credit charges or open additional lines of credit, or negotiate or consummate any financial contracts without the approval of the probation officer.

4. The defendant shall submit his/her person, residence, office, or vehicle to a search, conducted by a U.S. Probation Officer at a reasonable time, in a reasonable manner, and based upon reasonable suspicion contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CASE NUMBER: 3:01CR00172-002

DEFENDANT: ROBERT GUS "BOBBY" DESSELLE AKA "POPS," "UNCLE" AND "TIO"

CRIMINAL MONETARY PENALITIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

Totals:	Assessment	Fine	Restitution
	$200.00	$20,000.00	$

[] The determination of restitution is deferred until ___. *An Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

[] The defendant shall make restitution (including community restitution) to the flowing payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_.

[] The determination of restitution is deferred in a case brought under Chapters 109A, 100, 110A, and 113A of Title 18 for offenses committed on or after 09/13/1994, until up to

60 days. An amended Judgment in a Criminal Case will be entered after such determination.

[] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[] The interest requirement for the fine is waived.

[] The interest requirement for the fine is modified as follows:

RESTITUTION

[] The court modifies or waives interest on restitution as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total monetary penalties are due as follows:

A [x] Lump sum payment of $20,200.00 due immediately, balance due
[]not later than _, or
[]in accordance with []C, []D, or []E, or [] F below; or

B [] Payment to begin immediately (may be combined with [] C,[] D, or [] F below); or

C [] Payment in equal(e.g., weekly, monthly, quarterly) installments of $ _over a period of _ (e.g., months or years), to commence _ (e.g., 30 or 60 days) after the date of this judgment; or

D []Payment in equal(e.g., weekly, monthly, quarterly) installments of $_over a period of _(e.g., months or years), to commence _(e.g., 30 or 60 days) after release from imprisonment to a term of supervisor; or

E []Payment during the term of supervised release will commence within _ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F []Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

[] Joint and Several

[] The defendant shall pay the cost of prosecution.

[] The defendant shall pay the following court cost(s):

[x] The defendant shall forfeit the defendant's interest in the following property to the United States:

A. All funds in UBS Financial Services Account #06990 Title "Bobby G. Desselle."

B. All funds in UBS Financial Services Account #06998

C. All funds currently held in the registry of the Court in the Middle District of Louisiana for criminal Docket Number 01-172-D-M2 (as they relate to the case bond for this defendant).

D. The four (4) Hibernia National Bank Cashiers Checks total approximately $34,000.00 seized by the Drug Enforcement Administration (DEA) and Internal Revenue Service (IRS) from Desselle and his nominee.

E. Approximately $8,000.00 in United States Currency seized by DEA and IRS from Desselle and his nominee.

F. 1998 Kawasaki ZX9 motorcycle purchased by Desselle on or about May 4, 1998.

G. 1998 Kawasaki ZX11 motorcycle purchased by Desselle on or about November 24, 1998.

H. 2001 Bullet Bass boat purchased by Desselle on or about December 19, 2000.

I. 1999 Dodge Viper purchased by Desselle with approximately $50,000.00 in cash.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) final principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES OF AMERICA

VERSUS

ROBERT GUS "BOBBY" DESSELLE

CRIMINAL ACTION

NO. 01-172-D

HON. JAMES J. BRADY

FEBRUARY 3, 2005

SENTENCING

(Partial Transcript of Sentencing Hearing – Reasons for Judgment)

[p. 35]

The Court: Now, on the matter of the 5K1.1, I will grant the 5K Motion filed by the government and will reduce the guideline range by 10 points based on the government's 5K1.1 Motion.

****

[p. 49]

The Court: It is the sentence of the court that, after having considered the United States' Sentencing Guidelines and the sentencing factors enumerated in 18 U.S.C. 3553(a), it is the judgment of the court that the defendant, Robert Gus "Bobby" Desselle, be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 87 months on Counts 1 and Counts 2.

****

[p. 51]

The Court: Now, that is the sentence that I intend to impose, and as I indicated, that I have considered the sentencing guidelines, motions made by the government, the letters and matters submitted to the court by various persons, the medical status of the defendant, the sentencing memorandums that have been submitted by all parties, and other documents as well.

And I do not at all take what you did, Mr. Desselle lightly in any factor. You were a major drug dealer in this area. You know, got alot of folks, you know, wrapped up in a lot of things and -- you know, and all of you are now having to serve prison sentences.

You certainly, I think, were in it to make money, and you made a lot of money. And your money has been forfeited and your assets have been forfeited. And I considered that aspect as well. You have lost, in that sense, a lot of money, you know, by the forfeiture of all of the property and assets that you have -- or most of your assets.

You, on the other hand, have serious medical problems. You are now 57 years old. You know, 87 months from now, I do not think you are going to be wanting to go into the drug business. I think by that time you will be of sufficient age to just, you know, live out your life in a manner that does not involve dealing with drugs and breaking the law.

I think that the sentence that I have imposed, based on the circumstances of the offense, the history and the characteristics of the defendant, meet the needs of society; and it does reflect the seriousness of the offense; and it will show people that you are eventually going to get caught; and that you are eventually going to go, you know, to prison; and

that this is a just punishment, along with the forfeitures that you have made and the fine that will be paid, for the offense.

And I think that the sentence that I render will also afford adequate deterrence to further criminal conduct as much as those things have a tendency to do. I do not think that any further or longer sentence would protect the public from any crimes that you may commit in the future. If that does not get the message to you, then I do not think a longer sentence would. And it will also, hopefully, provide you with needed medical care and help you with the drug problem that you have.

Now, as I have said, this is within the range that is applicable under the finding by the court. It is not the lowest sentence that you could get; it is not the highest sentence you would get, but I think it is adequate for the needs here. I, you know, cannot overlook the things that you have done, you know, on the good side as well. But you are now going to have to pay for what you have done.

APPENDIX D

FOR THE FIFTH CIRCUIT

No. 30401

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

U.S. Court of Appeals

FILED

Jun 28,2006

Charles R. Fulbruge III
Clerk

ROBERT GUS "BOBBY" DESSELLE, also known as Uncle, also known as Tio, also known as Pops

Defendant-Appellee

Appeal from the United States District Court for Middle District of Louisiana, Baton Rouge

ON PETITION FOR REHEARING EN BANC

(Opinion 5/22/06, 5 Cir., _____, _____F.3d _____)

Before JONES, BARKSDALE, AND BENAVIDES, Circuit Judges

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Edith H. Jones

United States Circuit Judge

APPENDIX E

Relevant Statutory Provisions

Section 5K1.1 of the Federal Sentencing Guidelines

§51.1 Substantial Assistance to Authorities

Upon Motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

18 U.S.C. Section 3553

Section 3553. Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence. - The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed -

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for -

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines -

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such

amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement -

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of Guidelines in Imposing a Sentence. –

(1) In general
Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses
(A) (2) Sentencing

In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless -

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that -

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines

applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of Reasons for Imposing a Sentence. - The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence -

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefore. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,(3) and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence Procedure for an Order of Notice. - Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the

Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall -

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited Authority To Impose a Sentence Below a Statutory Minimum. - Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases. - Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at

sentencing, after the Government has been afforded the opportunity to make a recommendation, that -

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

FILED
DEC 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-435

In the Supreme Court of the United States

ROBERT GUS DESSELLE, AKA UNCLE, AKA TIO, AKA POPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
CHRISTOPHER R. MADSEN
Attorney
Department of Justice
Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether the extent of a sentencing reduction under Sentencing Guidelines § 5K1.1 or 18 U.S.C. 3553(e) (Supp. IV 2004) may be based on considerations unrelated to the defendant's substantial assistance to the government.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 14

TABLE OF AUTHORITIES

Cases:

American Constr. Co. v. *Jacksonville Ry.*, 148 U.S. 372 (1893) 5
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 5
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 10
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 5
Stinson v. *United States*, 508 U.S. 36 (1993) 10
United States v. *Booker*, 543 U.S. 220 (2005) .. 4, 6, 7, 8, 13
United States v. *Calzada-Maravillas*, 443 F.3d 1301 (10th Cir. 2006) 8
United States v. *Carey*, 382 F.3d 387 (3d Cir. 2004) 11
United States v. *Crawford*, 407 F.3d 1174 (11th Cir. 2005) 8, 9
United States v. *Dorcely*, 454 F.3d 366 (D.C. Cir.), cert. denied, No. 06-547 (Nov. 27, 2006) 13

Cases—Continued: Page

United States v. *Fernandez*, 443 F.3d 19 (2d Cir.), cert. denied, 127 S. Ct. 192 (2006) 8
United States v. *Haack*, 403 F.3d 997 (8th Cir.), cert. denied, 126 S. Ct. 276 (2005) 8
United States v. *Hadash*, 408 F.3d 1080 (8th Cir. 2005) 9
United States v. *Johnson*, 427 F.3d 423 (7th Cir. 2005) ... 8
United States v. *Jones*, 417 F.3d 547 (6th Cir. 2005) 13
United States v. *Mares*, 402 F.3d 511 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005) 8
United States v. *Martin*, 455 F.3d 1227 (11th Cir. 2006) 11
United States v. *McBride*, 434 F.3d 470 (6th Cir. 2006) 8
United States v. *McVay*, 447 F.3d 1348 (11th Cir. 2006) 12
United States v. *Mohamed*, 459 F.3d 979 (9th Cir. 2006) 9
United States v. *Moreland*, 437 F.3d 425 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006) 8
United States v. *Pearce*, 191 F.3d 488 (4th Cir. 1999) ... 11
United States v. *Pepper*, 412 F.3d 995 (8th Cir. 2005) ... 10
United States v. *Peterson*, 455 F.3d 834 (8th Cir. 2006) .. 13
United States v. *Rodriguez-Alvarez*, 425 F.3d 1041 (7th Cir. 2005), petition for cert. pending, No. 05-8615 (filed Jan. 5, 2006) 8

Cases—Continued: Page

United States v. *Saldana*, 427 F.3d 298 (5th Cir. 2005), cert. denied, 126 S. Ct. 810 (2005) and 1097 (2006) 8

United States v. *Selioutsky*, 409 F.3d 114 (2d Cir. 2005) 8

United States v. *Serrata*, 425 F.3d 886 (10th Cir. 2005) ... 8

United States v. *Shannon*, 414 F.3d 921 (8th Cir. 2005) 8

United States v. *Thomas*, 930 F.2d 526 (7th Cir.), cert. denied, 502 U.S. 857 (1991) 10

United States v. *Webb*, 403 F.3d 373 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006) 8

Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 5

Constitution, statutes and regulations:

U.S. Const. Amend. VI 6

Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*: 6

18 U.S.C. 3553(a) (2000 & Supp. IV 2004) .. 7, 8, 9, 12

18 U.S.C. 3553(a)(4) (Supp. IV 2004) 8

18 U.S.C. 3553(b)(1) (Supp. IV 2004) 6

18 U.S.C. 3553(e) (Supp. IV 2004) 3, 5, 12, 13

18 U.S.C. 3742(a)(1) 13

18 U.S.C. 3742(a)(3) 13

18 U.S.C. 3742(b)(1) 13

18 U.S.C. 3742(b)(3) 13

18 U.S.C. 3742(e) (2000 & Supp. IV 2004) 6

Statutes and regulations—Continued: Page

18 U.S.C. 2 2
18 U.S.C. 1957 2
21 U.S.C. 846 2
U.S. Sentencing Guidelines:
§ 5K1.1 ..... *passim*
§ 5K1.1(a) 10
§ 5K1.1(a)(2) 11
§ 5K1.1, comment. (backg'd.) 5, 11

Miscellaneous:

2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* (1991) 10
Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 6

In the Supreme Court of the United States

No. 06-435

ROBERT GUS DESSELLE, AKA UNCLE, AKA TIO, AKA POPS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 450 F.3d 179.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2006. A petition for rehearing was denied on June 28, 2006 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on September 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Louisiana, petitioner was convicted of conspiracy to distribute cocaine, in vio-

lation of 21 U.S.C. 846, and money laundering, in violation of 18 U.S.C. 1957 and 2. He was sentenced to 87 months of imprisonment, to be followed by five years of supervised release. The court of appeals vacated petitioner's sentence and remanded for resentencing.

1. Section 5K1.1 of the United States Sentencing Guidelines authorizes a district court, on motion of the government, to depart downward from the Sentencing Guidelines range on the basis of a defendant's substantial assistance to the government. Section 5K1.1 provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
> (3) the nature and extent of the defendant's assistance;
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
> (5) the timeliness of the defendant's assistance.

Sentencing Guidelines § 5K1.1.

Section 3553(e) of Title 18 of the United States Code authorizes a district court, on motion of the government, to impose a sentence below the statutory minimum on the basis of a defendant's substantial assistance to the government. Section 3553(e) provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. 3553(e) (Supp. IV 2004).

2. Petitioner worked as a funeral director at his family's funeral home in Baton Rouge, Louisiana. On the side, he sold large quantities of cocaine and marijuana, earning substantial profits that he laundered through purchases and business ventures. In 2004, petitioner pleaded guilty to conspiracy to distribute cocaine and money laundering. Based on a total offense level of 39 and a criminal history category of I, his Sentencing Guidelines range was 262 to 327 months of imprisonment. He was also subject to a statutory minimum prison term of 10 years. Pet. App. 2a.

Pursuant to Sentencing Guidelines § 5K1.1 and 18 U.S.C. 3553(e) (Supp. IV 2004), the government filed motions for a sentencing reduction based on petitioner's substantial assistance. Because petitioner's assistance had been minimal, the government recommended a 2-

level reduction in the offense level, which would have resulted in a Guidelines range of 210 to 262 months. The district court granted the government's motions, but reduced petitioner's offense level by 10 levels. The resulting Guidelines range was 87 to 108 months, and the district court imposed a sentence at the bottom of that range. In imposing the 87-month sentence, the district court relied, not only on petitioner's assistance, but also on the fact that petitioner's drug proceeds had been forfeited to the government and the fact that petitioner has medical problems. Pet. App. 2a-4a.

3. The government appealed, and the court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 1a-7a.

The court of appeals first observed that, although *United States* v. *Booker*, 543 U.S. 220 (2005), made the Sentencing Guidelines advisory, courts are still required to "calculate the guideline range," including any "upward or downward departure as allowed by the Guidelines." Pet. App. 4a. The Guidelines calculation is "reviewed de novo," the court said, and both the decision to depart and the extent of a departure are reviewed "for abuse of discretion." *Ibid.* Assuming the Guidelines range has been correctly calculated and there has been no abuse of discretion in departing from that range, the court explained, it must then be determined "'whether the sentence "is unreasonable" with regard to' the factors outlined in 18 U.S.C. § 3553(a)." *Ibid.* (quoting *Booker*, 543 U.S. at 261).

With respect to a downward departure under Section 5K1.1 of the Guidelines, the court of appeals explained that, although the factors enumerated in Section 5K1.1 "are not the only factors a court may consider in determining the extent of the * * * departure," any other

factors a court considers "must be related to determining the 'nature, extent, and significance of assistance.'" Pet. App. 5a (quoting Sentencing Guidelines § 5K1.1, comment. (backg'd.)). The court held that "the extent of a § 5K1.1 or § 3553(e) departure must be based solely on assistance-related concerns" and that the district court "abused its discretion" in this case "by considering non-assistance-related factors in determining the extent of the § 5K1.1 departure." *Id.* at 5a-6a. The court of appeals also concluded that, even if the district court had not relied on such factors, "the extraordinary departure [would] not [be] supported by the nature of [petitioner's] assistance." *Id.* at 7a.

ARGUMENT

Petitioner contends (Pet. 7-11) that a sentencing reduction under Sentencing Guidelines § 5K1.1 or 18 U.S.C. 3553(e) (Supp. IV 2004) may be based on considerations unrelated to the defendant's substantial assistance to the government. The court of appeals' contrary decision is interlocutory; it is correct; and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals vacated petitioner's sentence and remanded the case to the district court for resentencing. The decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for the denial of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *American Constr. Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946

(1993) (opinion of Scalia, J.). This Court ordinarily denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition to the Court. See *ibid.* While not an invariable rule, the practice makes particular sense in this case, where petitioner challenges a sentencing rule adopted by the court of appeals and his sentence is not yet final.

2. The court of appeals' decision is in any event correct.

a. In *United States* v. *Booker*, 543 U.S. 220 (2005), this Court held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. As a remedy for that constitutional infirmity, the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* See *Booker*, 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." *Booker*, 543 U.S. at 245-246 (citations omitted). The Court also severed the appellate-review standards in 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which had served to reinforce the mandatory character of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," un-

der which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] §3553(a)." 543 U.S. at 261.[1]

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[1] Section 3553(a) provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code * * * [;]
>
> * * * * *
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code * * * [;]
>
> * * * * *

b. *Booker* made clear that "district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." 543 U.S. at 264; see 18 U.S.C. 3553(a)(4) (Supp. IV 2004). Consistent with that statement, the courts of appeals have held that, before imposing sentence, district courts are obligated to calculate the advisory Guidelines range and to do so correctly.[2] Most courts of appeals treat Guidelines departures as part of the Guidelines calculation.[3] And when district courts miscalculate the

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(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. 3553(a) (2000 & Supp. IV 2004).

[2] See, *e.g.*, *United States* v. *Rodriguez-Alvarez*, 425 F.3d 1041, 1046 (7th Cir. 2005), petition for cert. pending, No. 05-8615 (filed Jan. 5, 2006); *United States* v. *Serrata*, 425 F.3d 886, 912 (10th Cir. 2005); *United States* v. *Shannon*, 414 F.3d 921, 923 (8th Cir. 2005); *United States* v. *Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *United States* v. *Crawford*, 407 F.3d 1174, 1178-1179 (11th Cir. 2005); *United States* v. *Webb*, 403 F.3d 373, 383-384 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006); *United States* v. *Mares*, 402 F.3d 511, 518-519 (5th Cir.), cert. denied, 126 S. Ct. 43 (2005).

[3] See, e.g., *United States* v. *Calzada-Maravillas*, 443 F.3d 1301, 1305 (10th Cir. 2006); *United States* v. *Fernandez*, 443 F.3d 19, 25 (2d Cir.), cert. denied, 127 S. Ct. 192 (2006); *United States* v. *Moreland*, 437 F.3d 424, 432-433 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006); *United States* v. *McBride*, 434 F.3d 470, 476 (6th Cir. 2006); *United States* v. *Saldana*, 427 F.3d 298, 308-313 (5th Cir. 2005), cert. denied, 126 S. Ct. 810 (2005) and 1097 (2006); *Crawford*, 407 F.3d at 1178-1182; *United States* v. *Haack*, 403 F.3d 997, 1003 (8th Cir.), cert. denied, 126 S. Ct. 276 (2005). The Seventh Circuit has taken the position that "after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions." *United States* v. *Johnson*, 427 F.3d 423, 426 (7th Cir. 2005).

Guidelines range, courts of appeals will remand the case for resentencing (unless the error is harmless) without addressing the question whether the sentence was unreasonable based on the factors in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). See, *e.g.*, *United States* v. *Hadash*, 408 F.3d 1080, 1082 (8th Cir. 2005); *United States* v. *Crawford*, 407 F.3d 1174, 1179-1182 (11th Cir. 2005).

The court of appeals applied those settled principles here. It recognized that a district court must correctly "calculate the guideline range," including any "upward or downward departure." Pet. App. 4a. It then held that the district court miscalculated the Guidelines range in this case, because the district court "abused its discretion * * * in determining the extent of the § 5K1.1 departure." *Id.* at 6a. The court of appeals therefore remanded for resentencing. *Id.* at 1a, 7a.

c. The court of appeals' conclusion that the district court abused its discretion in determining the extent of the Guidelines departure was correct. The district court "consider[ed] non-assistance-related factors in determining the extent of the § 5K1.1 departure," Pet. App. 6a, including the fact that petitioner's drug proceeds had been forfeited to the government and the fact that petitioner had medical problems, *id.* at 2a-4a. The court of appeals held that the district court had thereby abused its discretion because "the extent of a § 5K1.1 * * * departure must be based solely on assistance-related concerns." *Id.* at 5a. That holding is correct.

Accordingly, "instead of employing the pre-*Booker* terminology of departures," the Seventh Circuit has "moved toward characterizing sentences as either fitting within the advisory guidelines range or not." *Ibid.* The Ninth Circuit has adopted a similar approach. See *United States* v. *Mohamed*, 459 F.3d 979, 984-987 (9th Cir. 2006).

The first sentence of Section 5K1.1 grants district courts the authority to depart from the Guidelines range if the government makes a motion stating that the defendant has provided substantial assistance. The second sentence addresses the extent of any such departure. It provides that "[t]he appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following." Sentencing Guidelines § 5K1.1(a). It then lists five considerations related to substantial assistance: (1) the "significance and usefulness" of the assistance; (2) the "truthfulness, completeness, and reliability" of the information or testimony provided; (3) the "nature and extent" of the assistance; (4) any "injury" or "risk of injury" resulting from the assistance; and (5) the "timeliness" of the assistance. *Ibid.* Under the interpretive canon *ejusdem generis*, "general words" accompanying "specific words" in a "statutory enumeration" should be "construed to embrace only objects similar in nature to those * * * enumerated by the * * * specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). In the second sentence of Section 5K1.1, the general word "reasons" should be construed to embrace only objects similar in nature to those enumerated by the five specific considerations—namely, objects related to substantial assistance. See *United States* v. *Thomas*, 930 F.2d 526, 529 (7th Cir.), cert. denied, 502 U.S. 857 (1991); cf. *United States* v. *Pepper*, 412 F.3d 995, 998 (8th Cir. 2005) (applying related interpretive canon *noscitur a sociis*).

That construction is confirmed by the commentary to Section 5K1.1. See *Stinson* v. *United States*, 508 U.S. 36

(1993) (commentary that interprets or explains a guideline is ordinarily authoritative). The commentary states that, because "[t]he nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis[,] [l]atitude is * * * afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above." Sentencing Guidelines § 5K1.1, comment. (backg'd.). The quoted language strongly suggests that unenumerated factors are "relevant" grounds for departure only insofar as they bear upon the "nature, extent, and significance of assistance." See, *e.g.*, *United States* v. *Martin*, 455 F.3d 1227, 1235 (11th Cir. 2006); *United States* v. *Pearce*, 191 F.3d 488, 492 (4th Cir. 1999).

3. Petitioner does not contend that the decision below conflicts with the decision of any other court of appeals. On the contrary, he acknowledges that "several other federal appellate courts have * * * adopted th[e] [same] position" as the court below, Pet. 7 (footnote omitted), and he cites decisions from eight other circuits holding that the extent of a departure under Sentencing Guidelines § 5K1.1 may not be based on considerations unrelated to substantial assistance, *id.* at 7 n.2.[4]

Petitioner does contend (Pet. 7-10) that the decision below conflicts with this Court's decision in *Booker*. In

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[4] Petitioner also cites the Third Circuit's decision in *United States* v. *Carey*, 382 F.3d 387, 391 (2004), for the proposition that "factors not listed in 5K1.1 can be[] considered in deciding the extent of a 5K1.1 departure." Pet. 7 n.2. But the statement to that effect in *Carey* is dictum, because the district court in that case did not rely on any such factors. Instead, the district court relied on the defendant's credibility as a witness, 382 F.3d at 389-390, a consideration explicitly identified as a permissible one in Section 5K1.1(a)(2).

particular, he contends that the court of appeals' decision is "in direct contravention of *Booker*" because the court of appeals assertedly held that the government's Section 5K1.1 motion "stripped the district court of its discretionary power to consider any of the § 3553(a) factors." Pet. 9. Petitioner's contention is mistaken, because that is not what the court of appeals held.

What the court of appeals held is that the first step at sentencing is to calculate the advisory Guidelines range and that, in calculating one aspect of the Guidelines range (namely, the extent of a downward departure based on substantial assistance), a district court may not rely on considerations other than those authorized by the Guidelines provision at issue (namely, Section 5K1.1). The court of appeals' conclusion that the district court erred in relying on such considerations does not preclude the district court, on remand, from departing downward based solely on petitioner's substantial assistance and then deciding that a lower sentence—*i.e.*, a below-Guidelines sentence—is justified by the considerations in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). Indeed, "after it has decided the length of departure warranted by the substantial assistance motion, the district court is * * * *obliged* to take into account [both] the [resulting] advisory Guidelines range *and* the sentencing factors set forth in 18 U.S.C. § 3553(a) in fashioning a reasonable sentence." *United States* v. *McVay*, 447 F.3d 1348, 1356 (11th Cir. 2006) (emphasis added).

There are only two limitations on the district court's ability to impose such a below-Guidelines sentence. First, if a sentence below the 10-year statutory minimum is imposed, it cannot be based on any consideration unrelated to substantial assistance. See 18 U.S.C. 3553(e) (Supp. IV 2004) (authorizing sentence below

statutory minimum "so as to reflect a defendant's substantial assistance").[5] Second, whatever sentence is ultimately imposed, it cannot be "'unreasonable' with regard to § 3553(a)." *Booker*, 543 U.S. at 261.[6]

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[5] Like the Fifth Circuit in this case, Pet. App. 5a, the Eighth Circuit has held, post-*Booker*, that the extent of a reduction under 18 U.S.C. 3553(e) (Supp. IV 2004) can be based only on assistance-related considerations, *United States* v. *Peterson*, 455 F.3d 834, 837 (2006). Petitioner cites no decision that holds otherwise.

[6] Petitioner also challenges (Pet. 10-11) the court of appeals' alternative holding that, even if the district court's downward departure were based solely on assistance-related considerations, "the extraordinary departure [would] not [be] supported by the nature of [petitioner's] assistance." Pet. App. 7a. Citing pre-*Booker* Fifth Circuit decisions, petitioner contends that that holding is incorrect because district courts have "almost complete discretion to determine the extent of downward departures under § 5K1.1." Pet. 10. The cases on which petitioner relies, however, are ones in which a defendant appealed a substantial-assistance departure on the ground that the district court should have departed further. See *ibid*. The reason that the departures in those case were found to be essentially unreviewable is that, under 18 U.S.C. 3742(a)(3), a defendant could appeal a sentence only if it was "greater than the sentence specified in the applicable guideline range." See *United States* v. *Jones*, 417 F.3d 547, 551 (6th Cir. 2005) ("Where * * * the district court grants a downward departure for substantial assistance and the defendant's claim on appeal goes only to the extent of the departure, this Court has no jurisdiction over the appeal.") (citing 18 U.S.C. 3742(a)(3)). Under 18 U.S.C. 3742(b)(3), in contrast, the government could appeal a sentence that was "less than the sentence specified in the applicable guideline range." After *Booker*, moreover, *either* party can appeal a sentence, whether within or outside the Guidelines range, on the ground that it is unreasonable and therefore "in violation of law." 18 U.S.C. 3742(a)(1) and (b)(1); see *United States* v. *Dorcely*, 454 F.3d 366, 373-375 (D.C. Cir. 2006) (citing cases), cert. denied, No. 06-547 (Nov. 27, 2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2006